Supreme Court, U.S.
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No. 91-1736

IN THE

Supreme Court of the United States

OCTOBER TERM, 1991

WILLIE E. ENOCH,

Petitioner,

v.

PEOPLE OF THE STATE OF ILLINOIS,

Respondent.

On Petition for Writ of Certiorari to the Supreme Court of Illinois

RESPONDENT'S BRIEF IN OPPOSITION

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QUESTIONS PRESENTED

1. Whether this Court should deny certiorari where there was no actual conflict of interest which adversely affected petitioner's attorney's performance and, thus, there was no conflict between this Court's decision in *Cuyler v. Sullivan*, 446 U.S. 335 (1980) and Illinois' requirement of contemporaneous representation.

2. Whether this Court should deny certiorari where the Illinois Supreme Court correctly applied Illinois law regarding the requirement of filing a post-trial motion to preserve issues on appeal in capital cases.

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RESPONDENT'S BRIEF IN OPPOSITION

PRAYER

The State of Illinois asks this Court to deny the Petition for Writ of Certiorari to review the judgment and order of the Supreme Court of Illinois, entered December 19, 1991, insofar as the petitioner does not raise an issue worthy of review.

OPINION BELOW

The opinion below is cited as *People v. Enoch*, 146 Ill. 2d 44, 585 N.E.2d 115 (1991). A copy of the opinion is included in petitioner's appendix.

STATEMENT OF THE CASE

Petitioner, Willie E. Enoch, seeks review of the December 19, 1991 judgment of the Illinois Supreme Court affirming his conviction and death sentence. Review involves an examination of two issues: first, whether there is a conflict between this Court's decision in *Cuyler v. Sullivan*, 446 U.S. 335 (1980) and the Illinois Supreme Court's requirement of contemporaneous representation in order to establish a conflict of interest claim; and, second, whether the Illinois Supreme Court's requirement that a defendant must both object at trial and file a written post-trial motion in order to preserve issues on appeal in capital cases, was a retroactive application which denied petitioner due process of law.

Following a jury trial in November of 1983, petitioner was found guilty of murder, aggravated kidnapping, and attempt rape. The prosecutor elected to seek the death penalty. Petitioner waived his right to a jury for sentencing and following a hearing in aggravation and mitigation the trial court sentenced petitioner to death.

On direct appeal to the Illinois Supreme Court petitioner argued that it was constitutional error for the trial court to consider its finding that petitioner presented a "clear and present danger" in imposing a sentence of death. The People answered that no error existed where the remarks of the trial court, examined in context, were simply in response to petitioner's argument in mitigation and the evidence in aggravation was overwhelming. The Illinois Supreme Court found that this issue was waived on appeal because petitioner failed to file a post-trial motion. This Court denied petitioner's petition for a writ of certiorari. *Enoch v. Illinois*, 488 U.S. 917 (1988).

On April 13, 1989, petitioner filed a *pro se* petition for post-conviction relief, and on March 19, 1990, with the assistance of counsel, petitioner filed an amended petition for post-conviction relief, alleging *inter alia*, that his trial counsel had a conflict of interest that rendered him ineffective, and that the Illinois Supreme Court denied petitioner due process by creating and retroactively applying a "new" post-trial motion rule.

The State moved to dismiss both petitions. On April 19, 1990, the circuit court granted the State's motion to dismiss both the *pro se* and the amended petition.

The Illinois Supreme Court affirmed the dismissal of petitioner's post-conviction petitions on February 3, 1992. The petition for a writ of certiorari was filed with this Court on May 1, 1992.

REASONS FOR DENYING THE WRIT

I.

THIS COURT SHOULD DENY CERTIORARI WHERE THERE WAS NO ACTUAL CONFLICT OF INTEREST WHICH ADVERSELY AFFECTED PETITIONER'S ATTORNEY'S PERFORMANCE AND, THUS, THERE WAS NO CONFLICT BETWEEN *CUYLER v. SULLIVAN*, 446 U.S. 335 (1980) AND ILLINOIS' REQUIREMENT OF CONTEMPORANEOUS REPRESENTATION.

Petitioner claims that the Illinois Supreme Court's requirement of contemporaneous representation to establish a claim of conflict of interest is contrary to the Sixth Amendment right to the effective assistance of counsel and to this Court's holding in *Cuyler v. Sullivan*, 446 U.S. 335 (1980). Petitioner's claim is without merit.

The right to effective assistance of counsel comprises two correlative rights: the right to reasonably competent counsel and the right to counsel's undivided loyalty. *Wood v. Georgia*, 450 U.S. 261, 271-2 (1981). Petitioner complains he has been deprived of the effective assistance of counsel based upon the latter of these two rights. However, petitioner has failed to establish that his attorney actively represented conflicting interests or that an actual conflict of interest adversely affected his counsel's performance.

Generally, in order to succeed on an ineffective assistance of counsel claim, petitioner must overcome a strong presumption that his attorney's conduct fell within the wide range of reasonable professional assistance. *Strickland v. Washington*, 466 U.S. 668, 689 (1984). In order for petitioner to demonstrate that he was deprived of the effective assistance of counsel, he must demonstrate that:

(1) his attorney's representation fell below an objective standard of reasonableness, and (2) that there is a reasonable probability that, but for counsel's unprofessional errors, the result of that proceeding would have been different. *Id.* at 687-88. Failure to make the required showing of either deficient performance or sufficient prejudice defeats the ineffective claim. *Id.* at 700.

The first prong of the *Strickland* analysis addresses the performance aspect of counsel's representation. The competency of counsel may not be challenged based upon the exercise of judgment, discretion, trial tactics or strategy even in those instances where appellate counsel or the reviewing court may have handled things differently. *Id.* at 689. Petitioner must show that counsel made mistakes so serious that counsel was not functioning as the "counsel" guaranteed to petitioner by the Sixth Amendment. *Id.* at 687.

Even if this Court finds that counsel's conduct fell short of the first prong of the *Strickland* standard, in applying *Strickland*'s two-pronged standard, the court need not determine whether counsel's performance was deficient before examining the prejudice suffered by petitioner as a result of the alleged deficiencies. *Strickland*, 466 U.S. at 679. "If it is easier to dispose of an ineffectiveness claim on the ground of sufficient prejudice, which we expect will often be so, that course should be followed." *Id.* Petitioner must show that there is a reasonable probability that, but for counsel's mistakes, the end result of the trial would have been different.

However, there is an exception to this rule. This Court has held that one type of actual ineffectiveness claim warrants a limited presumption of prejudice. Where counsel is burdened by an actual conflict of interest, prejudice may

be presumed, but only if petitioner demonstrates that counsel "actively represented conflicting interests and that an actual conflict of interest adversely affected his lawyer's performance." *Id.* at 692 (*quoting Cuyler v. Sullivan*, 446 U.S. at 350. The **possibility** of a conflict is insufficient to overturn a criminal conviction. *Cuyler v. Sullivan*, 446 U.S. at 350.

Thus, just as the test for competent counsel contains two prongs, (1) deficient performance and (2) prejudice, so too does the test for conflict-free counsel. This latter test requires that before a defendant may succeed on a claim that he was deprived of his right to counsel's undivided loyalty, he must prove: (1) that counsel actively represented conflicting interests and (2) that an actual conflict of interest adversely affected his lawyer's performance. *Strickland*, 466 U.S. at 692.

Petitioner has failed to present evidence that his counsel actively represented conflicting interests. The instant case is unlike those in which courts have held that an actual conflict of interest exists. At least one court has found that where an attorney representing an appealing defendant could have been exposed to liability if a favorable outcome for the defendant was reached, an actual conflict of interest existed. *Mathis v. Hood*, 937 F.2d 790, 795 (2d Cir. 1991). In *Mathis*, the defendant brought a habeas corpus proceeding alleging that his due process rights were violated by a six year delay in hearing his appeal from his state court criminal conviction. Reversal of the defendant's conviction could have exposed the defendant's attorney to liability for his part in the delay. Affirmance, on the other hand, would have avoided sanctions against the attorney. The court held that where an attorney representing an appealing defendant could have been exposed

to liability if there was a favorable result for her client, an actual conflict of interest existed. *Id.*

Unlike *Mathis*, petitioner's counsel in the instant case would have been exposed to neither liability nor sanctions if the trial court reached a favorable result for petitioner. Counsel had nothing to gain if petitioner lost in court. Proctor was counsel's ex-client, and, further, counsel had no professional relationship with Proctor for many years. Thus any claim that counsel's loyalty was in any way compromised because he was defending petitioner where Proctor was a witness for the State is meritless.

Courts have held that even evidence that strongly indicates there **may have been** a conflict of interest is insufficient to resolve a petitioner's ineffective assistance of counsel claim. *United States v. Gambino*, 788 F.2d 938, 953 (3rd Cir. 1986). It must be shown that trial counsel labored under an **actual conflict** of interest. *Id.* In *Gambino*, trial counsel simultaneously represented, in separate proceedings in federal courts, two clients accused of committing the same crime. The court held that evidence strongly indicating that there may have been a conflict of interest was insufficient to resolve an ineffective assistance of counsel claim, instead, the court required the defendant to show that the trial counsel labored under an actual conflict of interest. *Id.*

Like the defendant in *Gambino*, petitioner has provided evidence that there may have been a conflict of interest. However, petitioner's evidence of a conflict is even weaker than Gambino's. In *Gambino*, counsel simultaneously represented two clients accused of committing the same crime. Here, counsel represented the State's witness four years earlier in a completely different matter. Furthermore, the professional relationship between counsel and

the State's witness had ceased to exist. Petitioner has failed to meet his burden. He has not demonstrated that his counsel actively represented conflicting interests. Accordingly, this Court should deny the petition for writ of certiorari.

II.

THIS COURT SHOULD DENY CERTIORARI WHERE THE ILLINOIS SUPREME COURT CORRECTLY APPLIED ILLINOIS LAW REGARDING THE REQUIREMENT OF FILING A POST-TRIAL MOTION TO PRESERVE ISSUES ON APPEAL IN CAPITAL CASES.

A. Both The Statute And Caselaw Provided Petitioner With Prior Notice As To The Post-Trial Motion Requirements For Preserving Issues On Appeal.

Petitioner contends that the Illinois Supreme Court improperly denied him meaningful appellate review, where the Court held that petitioner's failure to file a post-trial motion waived several issues on appeal. Petitioner contends that application of the post-trial motion requirement of Paragraph 116-1 of the Illinois Code to capital cases like the instant case, amounts to a rule change without prior notice in violation of petitioner's due process rights. Respondent submits that the Illinois Supreme Court correctly applied Illinois law to determine which issues were waived on appeal and which issues were subject to review on the merits.

Section 116-1 of the Code of Criminal Procedure of 1963, which was in effect at the time of petitioner's trial, specifies that "motions for a new trial by defendants in criminal cases shall be in writing and shall specify the grounds therefor." Ill. Rev. Stat. Ch. 38, §116-1 (1965). The enactment of §116-1 in 1963 did not affect any change in substance nor alter the rights of either of the parties in a

criminal proceeding. *See*, Committee Comments following article 116-1, Ill. Rev. Stat. Ch. 38, §116-1 (1965). Therefore, the statute itself provided petitioner with prior notice as to the requirements for preserving issues for appeal.

Furthermore, prior to petitioner's conviction, the Illinois Supreme Court held that failure to specify grounds for a new trial in writing in a motion for a new trial constitutes waiver of the issues on review in the absence of plain error. *People v. Pickett*, 54 Ill. 2d 280, 296 N.E.2d 856 (1973). The Court also found that this waiver rule applied to constitutional questions as well as to other issues. *Id.* In *People v. Irwin*, 32 Ill. 2d 441, 207 N.E.2d 76 (1965), the defendant had not raised in his motion for a new trial any of the questions raised on review. The Illinois Supreme Court held all of those questions were waived. The Court noted that requiring the defendant to specify alleged errors in a motion for a new trial may save the delay and expense inherent in an appeal, as well as focus the attention of the trial judge upon those aspects of the procedures of which the defendant complains. Accordingly, petitioner was also provided with caselaw apprising him of the requirements for preserving issues for appeal.

Petitioner contends that Illinois Supreme Court Rule 606(a) "trumps" Paragraph 116-1, therefore, he concludes that written post-trial motions are not necessary to secure appellate review. (Petition at 36). Petitioner's contention is erroneous.

Although the Illinois Supreme Court is required by the Illinois Constitution to review all cases in which a sentence of death is imposed, Ill. Const. 1970, Art. VI, §4(b), in balancing the provisions, the Court has held that the obligation to review death penalty cases does not require it to review every issue raised on appeal when the issues

are not properly preserved by both an objection in the trial court and a written post-trial motion. *People v. Caballero*, 102 Ill. 2d 23, 464 N.E.2d 223, *cert. denied*, 469 U.S. 963 (1984).

The Illinois Supreme Court has noted that although Illinois' constitution provides for the automatic review of capital cases, trial counsel nonetheless has an obligation to see that the statute requiring a post-trial motion is complied with so that review will be limited to issues of some significance. *Id.*; *People v. Porter*, 111 Ill. 2d 386, 489 N.E.2d 1329 (1986). By limiting its review in cases where no post-trial motion is filed, the Court promotes judicial economy and finality of judgments. In this way, the Court protects not only the rights of criminal defendants, but also the integrity of the judicial system. Without a post-trial motion limiting the consideration to errors considered significant, the appeal is open-ended. Appellate counsel may then comb the record for every semblance of error and raise issues on appeal whether or not trial counsel considered them of any importance.

In the present case the court defined the limits of such review in cases where defendant fails to comply with the statutory requirement to file a post-trial motion. The court held that such review will be limited to constitutional issues which have been raised properly at trial and which can be raised later in a post-conviction hearing petition, Ill. Rev. Stat. Ch. 38, §122-1 (1983), sufficiency of the evidence and plain error.

Petitioner contends that such definition of the extent of review absent a written motion was without warning. However, the Illinois Supreme Court already addressed that issue in this case, when it stated:

> Quite to the contrary, the procedure we outline is in fact an **expansion** of the right of review previously allowed by this court when no written post-trial motion has been filed. As stated in *People v. Pickett*, 54 Ill. 2d 280, 296 N.E.2d 856 (1973), such a failure has, in the past constituted error, except in cases involving plain error.

People v. Enoch, 122 Ill. 2d 176, 190-91, 522 N.E.2d 1124, 1132 (1988) (emphasis added).

The Court then went on to address the merits of those issues that fell within the stated categories. Clearly, the Illinois Supreme Court properly applied Illinois waiver law in subjecting the instant case to its required review. Only after finding that the issue here was not properly preserved for review by the filing of a written post-trial motion and after finding that this issue did not fit into one of the three exceptions to the expanded Illinois waiver rule did the Court find the issues were waived and not subject to review.

Illinois law allows for review of errors which have not been properly preserved where the evidence is closely balanced under the plain error doctrine. *People v. Pickett*, 54 Ill. 2d 280, 296 N.E.2d 856 (1973). However, justice does not require the application of the plain error doctrine under the facts of this case. Here, the evidence of petitioner's guilt was proven by overwhelming evidence.

B. The Illinois Supreme Court's Proper Application Of Its Post-Trial Motion Rule Does Not Conflict With This Court's Decision In *Bouie v. City of Columbia.*

Petitioner claims he had no fair warning as to the type of conduct the Illinois statute required. He claims that the Illinois Supreme Court retroactively applied a "new

rule" in conflict with this Court's decision in *Bouie v. City of Columbia*, 378 U.S. 347 (1964). Petitioner's claim is without merit.

Initially, respondents note that the instant case is unlike *Bouie*, because the instant case does not concern a rule proscribing criminal conduct which was retroactively applied and resulted in denying an individual due process of law. The issue here is only whether a procedural rule was retroactively applied.

Furthermore, unlike in *Bouie*, here the Illinois Supreme Court did not overrule a consistent line of procedural decisions. Rather the statute itself, effective since 1965, provided fair warning as to the requirements for preserving issues on appeal. According to Paragraph 116-1 both an oral objection and a written post-trial motion are required to preserve an issue on appeal. Ill. Rev. Stat. Ch. 38, §116-1 (1965). In addition, decisional law available prior to petitioner's commission of the crime also provided fair notice as to the requirements for preserving issues on appeal. *People v. Pickett*, 54 Ill. 2d 280, 296 N.E.2d 856 (1973); *People v. Irwin*, 32 Ill. 2d 441, 207 N.E.2d 76 (1965). Thus this Court cannot conclude that the Illinois Supreme Court's reasoning was unforeseeable given the language of the statute in question. *Hopkins v. Shillinger*, 645 F. Supp. 374, 388 (D. Wyo. 1986).

Neither can petitioner complain that the Illinois Supreme Court's decision was unforeseen because his counsel had fair notice of the statute and, further, counsel understood its requirements. The fact that petitioner's counsel incorrectly determined that the statute did not apply to capital cases and, thus, it was not necessary to file a post-trial motion in order to preserve issues for appellate review, is unfortunate. However, counsel's omission did not result

in a denial of due process,[1] nor is it in any way inconsistent with this Court's holding in *Bouie*.

CONCLUSION

In view of the foregoing reasons, respondent respectfully urges this Court to deny the Petition for a Writ of Certiorari.

Respectfully submitted,

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This Brief was prepared with the assistance of DAVID ABELS, a second year law student at The John Marshall Law School.

[1] The Illinois Supreme Court found that trial counsel's failure to raise alleged errors during trial and in a post-trial motion for a new trial did not constitute ineffective assistance of counsel, where overwhelming evidence of defendant's guilt and aggravating circumstances demonstrated that defendant could not show any prejudice by counsel's failure. *People v. Enoch*, 122 Ill. 2d 176, 202, 522 N.E.2d 1124, 1137 (1988).